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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PAUL S. GREWAL, MAGISTRATE JUDGE

ADAPTIX, INC., Plaintiff, v. APPLE, INC., et al., Defendants. and related cases.	Case Nos. CV 13-01776 PSG; CV 13-01777 PSG; CV 13-01778 PSG; CV 13-01844 PSG; CV 13-02023 PSG; CV 14-01259 PSG; CV 14-01379 PSG; CV 14-01380 PSG; CV 14-01385 PSG; CV 14-01386 PSG; CV 14-01387 PSG; CV 14-02359 PSG; CV 14-02360 PSG; CV 14-02894 PSG; CV 14-02895 PSG; CV 14-03112 PSG

San Jose, California
Tuesday, September 23, 2014

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FTR 5:00 p.m. - 6:06 p.m. = 66 minutes

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Tuesday, September 23, 2014

5:00 p.m.

P R O C E E D I N G S

THE COURT: All right, Mr. Rivera, let's turn to the related cases. Could you please call them?

THE CLERK: Yes, your Honor. Calling Adaptix, Inc., versus Apple, Inc., et al., case number CV13-1776 PSG and related cases, on for case management conference.

Counsel, please state your appearances.

THE COURT: I should warn you, I only have about 12 chairs, so don't make me start playing music.

UNIDENTIFIED SPEAKER: Your Honor, they wind up sitting outside if they settle.

THE COURT: All right, why don't we take appearances. Line them up and start belting it out. I'll start with -- well, we'll start over here, on the left, plaintiffs.

MR. GANNON: Kevin Gannon from Hayes, Messina, Gilman & Hayes, for Adaptix.

MR. HAYES: Paul Hayes, your Honor, for the plaintiff.

MR. BANYS: Chris Banys for the plaintiff, your Honor.

MR. TURNER: Glen Turner, local counsel for Sony Mobile Communications, USA, Inc., and its primary counsel is

Jim Mahon.

MR. MAHON: Jim Mahon, Andrews Kurth, for Sony Mobile. Thank you.

MR. McGRORY: Mark McGrory for Sprint, your Honor, Rouse Hendricks German May, from Kansas City.

MS. TULLMAN: Molly Tullman for Sprint, from Sheppard Mullin.

THE COURT: All right.

MS. BIBBY: Gina Bibby, Baker Botts, for AT&T.

MS. VENKAT: Sarita Venkat, for (inaudible).

MR. WILLIAMS: Your Honor, Fred Williams and Michael Reeder for HTC and AT&T.

MR. KUBEHL: Doug Kubehl with Baker Botts for AT&T Mobility and T-Mobile.

MR. SELWYN: Mark Selwyn and Craig Davis for Apple.

MR. FLANAGAN: Good afternoon, your Honor. Mark Flanagan and Geoff Godfrey for Verizon.

MR. LEMIEUX: Ron Lemieux, your Honor, for ASUSTeK, ATI and AT&T mobility.

MR. CRUZEN: Rob Cruzen, your Honor, for Amazon.com, Inc.

MR. EISEMAN: Your Honor, David Eiseman on behalf of Kyocera.

MS. GOLINVEAUX: Jennifer Golinveaux, your Honor, on behalf of Dell.

THE COURT: We've already heard from Mr. Godfrey through Mr. Selwyn, I believe, or through Mr. Flanagan, anyway.

MR. DAVIS: Mr. Davis with Mr. Selwyn, your Honor.

THE COURT: Mr. Davis, good to have you back, as well.

All right, and on the telephone, let me just recite the names that I believe are on the line, and ask you to confirm your appearance.

Mr. Ercolini, are you there?

MR. ERCOLINI: Here, your Honor.

THE COURT: All right, good afternoon, or good evening, sir.

Mr. Foster?

MR. FOSTER: Yes, your Honor, here.

THE COURT: All right, Mr. Hughes, are you on line?

MR. HUGHES: Yes, your Honor. Good evening from New York.

THE COURT: All right, and we also have Mr. Kuncheria?

MR. KUNCHERIA: Present, your Honor.

THE COURT: All right, Mr. Hardt?

MR. HARDT: Yes, good afternoon, your Honor.

THE COURT: Good afternoon. Ms. Tempesta?

MS. TEMPESTA: Yes, your Honor, good afternoon.

THE COURT: Welcome. Have I missed anybody on the

phone? All right, is there anybody else in the courtroom that wants to say hello? If not, please have a seat.

Why don't we get started. I've done my best -- first of all, let me say thank you to all of you for your flexibility. I am in the middle of a jury trial, and so I appreciate your willingness to accommodate that conflict.

I have done my best to prepare for this afternoon by going over each of your joint case management conference statements, in what I'll call the three buckets of cases that seem to be before me this afternoon.

My thought is that we first address some of the scheduling issues in what I'll call bucket one, which include the Apple, AT&T Mobility, Verizon cases, and then we can turn to buckets two and three. I think if we resolve the issues in bucket one, some of the other issues in the other buckets will hopefully be resolved, as well.

Turning to bucket one, and for purposes of our record, I will just confirm I'm now referring to cases 13-1776, 1777, 1778, 1844 and 2023. All right, with those cases in mind, let me begin by asking about the first issue on my plate, which is, who's going to trial and when.

It seems that I have three proposals in front of me, maybe four. I have a proposal from Apple, and AT&T and Verizon. I have an alternative proposal from HTC, and then the plaintiffs have offered two alternatives of their own. So

I think I've got a grand total of four possibilities before me.

If I understand all of these different proposals, the plaintiff is in agreement with HTC that it would be preferable to have Apple and HTC try their cases first. I believe plaintiff has indicated that if that's not the preference of the Court, their next proposal would be for the HTC-AT&T case to go first.

Alternatively, Apple, I understand, is proposing that it try its case with Verizon after the HTC and AT&T case goes. In that second wave, there would also be an Apple and AT&T case.

So with all of that as background, let me begin with the plaintiffs, and ask, what's the rationale, in your view, to have the Apple and HTC cases go first? Mr. Hayes, why don't you go ahead, sir.

MR. HAYES: Well, the Apple and HTC cases -- I mean, bottom line, Judge, is if you could combine them together, then we could figure out how to do that, irrespective of the law, which is -- could be a concern, but the question is whether --

THE COURT: I do tend to give some weight to that every now and then.

(Laughter.)

MR. HAYES: Well -- well, right, we could a little bit, but it's the same transaction or occurrence, and I mean, obviously, here, everything stems from a Qualcomm chip.

There's no difference in infringement, no difference in validity, and in fact, they all have the same validity expert, and they're basically all saying the same thing, vis-a-vis Qualcomm.

We can get rid of four birds with one shot, and I think the only difference in the entire case is just the amount of damages. Maybe it takes a few more days for the damages, but I think given the fact that it's all we can -- I think that the American Invents Act would not apply to prohibit this, simply because these aren't the typical thing where A is doing something a little bit different and B is doing something. Everybody agrees it's the Qualcomm chip, how does it work, they all use it, they all sell it, and they all, we say, infringe by doing so. So that's our first thought.

Our second thought is that if that doesn't pass muster with you, HTC should go first, and the reason HTC should go first is real simple. These cases are transferred from Texas. The HTC case was first filed in Texas in January 13th in 2012, and the Apple case was filed in March 9th, 2012, a few months later, and I think just simply because Apple asked to go first, so what? In my view, we just follow the rules.

THE COURT: All right.

MR. HAYES: And so that's basically it, to just get it cranking. Now, the only thing you should know, and I think to put it bluntly, or put this all in perspective, you've got

your trial date set in here for February 9th, which is fine, but we have a trial date on the Adaptix cases in Texas with a pretrial on the 8th.

THE COURT: So has Judge Schneider actually set the date of trial on --

MR. HAYES: Yes. He has set the trial date -- excuse me. He set the pretrial date at the 8th, and in his standard order, which we've got a copy if you want to look at it, it says trial will be tried within four weeks, but effectively, the way it works down there is that that pretrial is a bit too much, actually, but the point is, the pretrial will be the 8th, right? We'll most likely empanel Monday, and then boom, it will be -- it will be over. I mean, it's going to be over by, you know -- in a week. He is not going to give us more than a week, particularly if it's just one Qualcomm chip, that's it.

So I'm just letting you know that, your Honor, that that's the way it works down in Texas, and that's the scenario that we're all going to have to deal with.

THE COURT: I understand, and I appreciate that.

MR. HAYES: And otherwise, we're ready to just tee them up and do them.

THE COURT: Okay, I think I have your position. I should say, before I turn to the defendants, I may have mischaracterized Apple's preference. My understanding is

actually that Apple prefers to go first with Verizon.

Is that right, Mr. Selwyn?

MR. SELWYN: That's correct, your Honor.

THE COURT: Okay. Why don't you give me your thoughts, and I'll invite the thoughts of others, as well.

MR. SELWYN: Thank you, your Honor. To date, Adaptix has filed 30 cases involving the patents-in-suit, including what your Honor has called the first bucket of cases for purposes of this hearing. In each of those cases, the defendants are one handset manufacturer and one carrier, and the infringement allegations relate to the use of a handset on a particular carrier's network.

There's a reason that Adaptix has not sued multiple manufacturers and carriers in a single case, and it's because the AIA, and specifically 35 U.S.C. Section 299, forbids it, and here, the accused products in the cases against Apple and the cases against HTC are different, and the factual evidence will be different for the different networks.

Adaptix talks about the baseband chip being the same. Well, that is not all of the evidence. There's also evidence on the base station side. The factual evidence that will be presented by the carriers will be different in this situation.

So simply put, the AIA's joinder provisions prevent this Court from joining Apple and HTC for purposes of trial

absent consent of all the parties. There would have been no basis for Adaptix to have sued Apple and HTC in the same case originally, and there's no basis today to join Apple and HTC as defendants together.

And even putting aside the AIA, there's no procedural mechanism to do what Adaptix has proposed in having Apple and HTC as defendants in a trial. In essence, they're suggesting that Apple and HTC be severed from their co-defendants in the existing court cases, then joined together as defendants in a new case, a case that doesn't exist, leaving behind AT&T and Verizon, presumably for some unknown number of trials themselves. And again, even if the Federal Rules permitted this type of maneuver, the AIA does not.

There are lots of practical considerations in addition to that for why Apple and HTC should not be tried together. This case has proceeded through discovery on the assumption that the trials would be a particular manufacturer-carrier pairing. Had the parties known these pairings would change for trial, the parties likely would have approached discovery differently with respect to one another.

Adaptix's complaints in its infringement contentions all allege that each pair of defendants infringed the patents based upon their use of a particular handset manufacturer's products on a particular network, and on that basis, each pair of defendants have served expert reports that address

noninfringement from the perspective of use of the accused products on a particular network. For example, Apple has served separate noninfringement and damages expert reports in the cases involving Verizon and AT&T.

At trial, Apple and Verizon as co-defendants and then Apple and AT&T as co-defendants, under what Apple has proposed, expect to present evidence and witnesses that address both the operation of the handset and the operation of the network. If, as Adaptix has proposed, trial should proceed without the carriers, then Apple would be prejudiced in its ability to present all the evidence that it had been relying would be presented through the witnesses of the carriers.

THE COURT: May I ask you just a couple questions about your proposal, Mr. Selwyn? First, as I understand it, in Apple's proposal, which is joined by each of the defendants in its bucket other than HTC, as I understand it, there would be first an Apple-Verizon trial in February, correct?

MR. SELWYN: Correct.

THE COURT: And then, if necessary, a second trial involving HTC and AT&T, correct?

MR. SELWYN: That's right.

THE COURT: So would the Apple -- I'm sorry -- would the Apple-AT&T trial be a third trial that trailed the other two? Is that how you're imagining this?

MR. SELWYN: That's correct, and presumably, after

the first two trials, there are going to be estoppel issues that are going to affect the range of issues that could be tried in subsequent trials, if any are left at all.

THE COURT: Okay. The second question I have is, I think you are most persuasive just pointing out the practical implications of one proposal versus another. You've suggested that if Apple were severed from Verizon, for example, and smashed into HTC in the first trial, that there might be some issues regarding the evidence that would be presented coming from Verizon.

What would prevent -- I presume, even if I made you go to trial with HTC and even if I could do that under the section -- under Section 299, you would still have access to witnesses, documents and the like from Verizon, correct?

MR. SELWYN: Not necessarily. They're not with --

THE COURT: Tell me why. What am I missing?

MR. SELWYN: Well, they wouldn't be within our subpoena power. We couldn't compel them to be testifying. I suppose we could use the depositions that have been taken, but we haven't been proceeding on discovery on the basis that we would have to use deposition testimony at trial. We certainly didn't question witnesses, because our assumption was those witnesses would be available at trial, based upon the pairings selected by Adaptix.

THE COURT: All right. And am I correct in

understanding that among the defendants, HTC is the only one who disagrees with your proposal, at least in this bucket?

MR. SELWYN: That's correct.

THE COURT: Okay, well, perhaps I might turn to HTC. I'm looking for you, Mr. Williams.

Thank you, Mr. Selwyn.

MR. HAYES: Excuse me, your Honor. I think you might have mis- -- I hate to interrupt, but --

THE COURT: Go ahead, sir.

MR. HAYES: -- you might have misunderstood a little bit about our proposal.

THE COURT: Okay.

MR. HAYES: But we did not propose to exclude from this first trial the carriers, at all.

THE COURT: So you would include Verizon, for example --

MR. HAYES: Of course --

THE COURT: -- and AT&T in that first trial.

MR. HAYES: -- because Verizon and AT&T are the same carriers that everybody uses.

THE COURT: So there would actually be four defendants in that first trial, is what you're telling me.

MR. HAYES: Well, yeah, you'd have Verizon, AT&T, HTC and Apple, and so anybody can use any witnesses, any documents, whatever that log, they're all going to be here, in

one shot, so off we go, and the notion that the base station is some type of critical difference, these patents are handset patents, which I'm sure you're well aware of, and the base station -- all the base station is telling the handset is just to record in Mode 3, and then boom, the Qualcomm chip does it.

I mean, so it is what it is. It's not, you know -- so what?

THE COURT: I appreciate that clarification. Maybe I misunderstood. I understood that the plaintiff was signing on to the HTC proposal and I had understood from HTC that they were proposing to exclude the carriers from that first trial, so...

MR. HAYES: I think you're exactly correct, and I think what happened is, I think when I was asked what are we going to do here, I misunderstood -- I didn't catch, frankly, that they excluded the carriers.

So my thought is -- my thought is, I'd rather have a two-week trial, boom, for everybody, all the documents are here, everything's here, there's one chip, and boom, we're out of here.

THE COURT: All right. Well, Mr. Williams, we're talking about your proposal, so why don't you tell us what you meant.

MR. WILLIAMS: Your Honor, I would say --

THE COURT: And what you said, actually.

MR. WILLIAMS: -- HTC's proposal originally was to have a manufacturer-only trial first.

THE COURT: Okay.

MR. WILLIAMS: And our interest was definitely in efficiency. Having reviewed the law since we made our filing last week, I agree with Mr. Selwyn's assessment of the AIA, and I think Mr. Hayes conceded the same when he started and said, if we can do this without regard for the law --

THE COURT: So are you now jumping on to the Apple, et al., bandwagon?

MR. WILLIAMS: Not exactly, your Honor.

THE COURT: Okay, tell me what you'd like to do.

MR. WILLIAMS: HTC would like to go to trial first.

THE COURT: Okay.

MR. WILLIAMS: I understand that AT&T may not be as available for trial in February because of the Texas setting. I can't speak for Verizon, but HTC would really like to be in the first trial, and they're happy to do so with whatever co-defendants are available, or no co-defendants.

THE COURT: Okay. I think I have your proposal. And may I ask, Mr. Williams, I think you had suggested somewhere in the statement that you were seeking some relief or proposing to seek some relief from Judge Schneider?

MR. WILLIAMS: So AT&T is --

THE COURT: Oh, that's AT&T, I'm sorry.

MR. WILLIAMS: -- your Honor, and I'm really kind of speaking for HTC today, and Mr. Kubehl is prepared to address the issues for AT&T.

THE COURT: Okay.

All right, well, Mr. Kubehl, perhaps you might just address this piece.

MR. KUBEHL: Thanks, your Honor. AT&T is uniquely situated here, because it's the defendant that faces two potentially overlapping trials, and you heard from Mr. Hayes that in Texas they have the pretrial conference and then they line you up for a trial, and we could have any number of trials set for that pretrial conference. There's no guarantee that the Adaptix case gets to go first.

So AT&T is in a position where its witnesses, some of them are fairly high up corporate witnesses, could be asked to either be in a conflicting situation between the two jurisdictions or trying to shuttle between the two jurisdictions, at the very least having back-to-back trials, and faced with these high corporate witnesses, you know, having to take many weeks out of their lives instead of hopefully resolving it in one court or if not, maybe down the road catching another case.

THE COURT: May I ask, Mr. Kubehl, do you happen to know, as Judge Schneider's schedule currently stands, are there other non-Adaptix cases that are positioned for trial in that

same four-week window?

MR. KUBEHL: I don't know the answer to how many there are. I can say that I am on another case with Judge Schneider that was set for trial this fall and he's moved that back, because he does have a pretty heavy load right now.

So from the AT&T side of things, we are in favor of the Apple-Verizon case going first, because that alleviates the stress of having the conflicting cases for us.

We are not in favor of the one large trial with all the defendants. As Mr. Selwyn pointed out, we didn't prosecute this case assuming that we would have to get any discovery from Verizon. We would have to know what their confidential documents say. AT&T and Verizon are competitors with one another, and did not anticipate that they'd be in a trial where they'd have to face each other's documents. We're in a situation now where if it was one large trial, there would be many Verizon documents, HTC documents, that I frankly have never seen and I'd have to face those in trial and would not be equipped to answer them.

THE COURT: All right. Thank you, Mr. Kubehl.

Does anybody else want to be heard on this issue?

MR. FLANAGAN: Just briefly, your Honor --

THE COURT: Of course.

MR. FLANAGAN: -- for Verizon. We agree with Mr. Kubehl. I guess the only thing I'd add, apart from just

echoing his comments, is that if you put AT&T and Verizon together in one trial, I think -- we think that there's a strong likelihood of jury confusion. For example, while we don't know the details of AT&T's configuration, we do understand that networks are differently configured, and if you're going to have two handset manufacturers, two carriers, it's going to be a lot to manage.

As between AT&T and Verizon, AT&T and Apple agree, and Verizon agrees, that the best configuration is Apple and Verizon, and I guess the only thing I'd add to that is that since the same firm is representing Verizon and Apple, we think that that will alleviate many of the sort of inherent inefficiencies of a multi-party case.

THE COURT: All right. One question for you, if I could. Let me just put out there, I have a hard time getting my head around having two or more defendants at trial together that don't want to be there, in light of Section 299. So even though I have my own issues with Section 299, I'll save that for my article. I'm kind of constrained here.

As I understand what Adaptix is saying, though, they're pointing to the fact that, all things being equal, the HTC case -- the HTC-AT&T case was filed first, and so if they're going to be stuck with a manufacturer and carrier case as the first case, why wouldn't be only fair to say, they filed that one first, that's the case that ought to go first?

MR. FLANAGAN: Yeah, I mean, we thought about that, your Honor, and, you know, frankly, we don't think it's relevant. You could also say that the Apple case in this court is the low-numbered case, and so under those rules, it would go first.

But we don't think any of that's relevant. Quite honestly, all of these cases in the wave one set of cases have been tried -- have been litigated in parallel. So effectively, there's no priority to any of the cases. The dates have been consistent, certainly in this court, but even when we were in Texas, it's all the same schedule. So there's really no distinguishing between, this would have to be filed a month earlier or this one was low-numbered.

THE COURT: All right. Thank you.

MR. FLANAGAN: Thank you.

THE COURT: Mr. Hayes, am I correct in understanding, sir, your position that if we're going to do a one manufacturer, one carrier case, you would rely upon the fact that you filed suit against HTC and AT&T first and that's the case that ought to go first?

MR. HAYES: Yes, I mean, I think that basically that's the -- I have not heard from anybody why somehow we should magically try Apple as opposed to HTC first, there's some benefit. The benefits seem to be even across the board. They were first filed. First, I think, should be first filed,

first tried, and the comment that I could have to my brother about trying to distinguish the carriers, this is not patents on the network of the carrier. This is the phone. All the phone does is get a signal saying, do transmission Mode 3. I mean, report, right?

They all admit that both carriers send that out. That's it. That's the only relevant fact. I don't care if AT&T has 400 towers here or whatever, that's it.

So I think, if you look at the claim, that's all I have to establish with them, and your Honor, none of the secrets of either one -- I think this whole secrets that they're trying to do on this is basically, with all due respect, what they're trying to say is, gee, you know, AT&T's got a lot of good admissions in their publications and stuff, and Verizon's got a lot of good admissions and, you know, we don't want to have both people admitting the same thing, that might not look good. That's the motive behind the trial tack. It's a good one, but I don't think it should hold water, frankly.

THE COURT: Can I ask you, Mr. Hayes, I appreciate that Judge Schneider has not yet fixed a date, but he has made it pretty clear, as you pointed out, these cases are going to go in some window absent some extraordinary turn of events.

And so it would seem to me, if I understand it correctly, if AT&T and/or HTC are the only cases that are

subject to a conflict in light of what Judge Schneider proposes to do, why shouldn't I help my senior colleague out by taking that conflict off the table and starting with the Apple and Verizon case? What are your thoughts about that?

MR. HAYES: I mean, I don't think there's any conflict at all with respect to trying the Texas case first. Texas case first is just -- it's LG. It's LG versus -- who is it?

UNIDENTIFIED SPEAKER: AT&T.

MR. HAYES: AT&T, LG, that's it. Verizon's not in the Texas case.

THE COURT: Right. So what I'm asking about, sir, is, as to AT&T, as I understand what Mr. Kubehl has just pointed out, AT&T right now is looking at a trial in Texas right on top of the first trial in this court.

Why wouldn't -- out of, you know, why wouldn't it make good sense, just out of comity, if nothing else, for me to say, you know what, I normally am going to look at the first filed case and set AT&T along with HTC as the first trial, but because AT&T is already designated to go to trial in front of Judge Schneider at that same time, we're going to start with Verizon and we're going to start with Apple?

What are your thoughts about that?

MR. HAYES: I don't know how, really -- I don't know how it makes any -- with all due respect, any sense, because

what are we talking about? AT&T's going to show up in Texas, it's going to be -- it's only a four-day trial. I mean, in Texas, they -- you know, it's over before it starts, and --

THE COURT: That's certainly how I felt. (Laughter).

MR. HAYES: Right. Well, that's -- sometimes that's the way, a lot of these --

THE COURT: And I admire their efficiency. Frankly, I wonder sometimes why I can't try a case in four days, but in any event...

MR. HAYES: Well, you ought to go up to Boston in front of Judge Young.

THE COURT: I've had that experience, too. I understand, yeah.

MR. HAYES: He told me once, he said, "Hayes, you can cross-examine three experts in 24 minutes and waive your closing, or go for -- just shot in the crosses." So I get one question per expert, if I want a closing.

THE COURT: He'd also make you defend your invalidity case first, right?

MR. HAYES: That's -- he used to do it, and then everybody insists --

THE COURT: My information and experience may be dated.

MR. HAYES: No, no, no. No, he did, he did, and

then everybody was screaming and yelling at that one because of the conflicts, to a point where I think he's throwing his hands up and said, ah, we'll do it the old-fashioned way, and just tee them up and go do it.

But I mean, I don't see why AT&T -- I mean, we're not talking about bringing in the President of AT&T and all these executives. We're talking about someone's going to be a AT&T -- just, whatever it is, and the big -- and it's basically their experts. And their experts -- their experts on validity are all the same, and so I don't think -- I think there's so much, I don't think -- I think there's a lot of smoke and not a lot of meat on the bone to my brother's argument.

THE COURT: All right. If anybody wants to offer any last points on this, we've got a lot to cover. Any last points here? No? Okay.

Well, because I -- well, let me say this. I don't think under Section 299 I can try multiple defendants, so even though I'm tempted, I don't think I can do that, so I won't do that.

I do think that given the positions of the parties here, my choices are to try either the manufacturers together or a plaintiff and a carrier as a first case, and on balance, I'm persuaded that my only option, again, under Section 299, is to accede to whatever the defendants are willing to consent to short of having everybody getting their own trial.

The bottom line is, I'm going to try the Apple and Verizon case first. I'm then going to turn to HTC and AT&T, and finally, to the extent necessary, Apple and AT&T. I think on balance, this -- it's the best way to avoid any conflicts with Judge Schneider's calendar and to get everybody to trial as soon as we can.

Let's turn next in this first wave or bucket to the issue of -- one issue that I wanted to address, which is the 2023 case. I think in a footnote somewhere, someone mentioned that these cases -- that case is now overlapping entirely with, I believe it's the 1777 case?

MR. GANNON: That's right.

THE COURT: Okay. May I ask, Mr. Hayes, or any of your colleagues, have you had a chance to consider, do we Ned to keep the 2023 case around, or --

MR. GANNON: Yes, your Honor.

THE COURT: Tell me why.

MR. GANNON: The 2023 would be the case we keep, and we have to look into it a little bit more, but the 1777 case would be the one we drop. I think the accused products in the 2023 case is the most up-to-date.

THE COURT: Okay, well, for what it's worth, I don't particularly care which one we keep and which one we drop. I'm just looking to shorten the caption page --

MR. GANNON: Absolutely.

THE COURT: -- and take it off of my list. So if there's any further discussion you had, I'm willing to give you a chance to talk it through, but it seems we're all in agreement there should be one of those cases, not two, is that --

MR. GANNON: Yeah, we could do it offline, your Honor. We could --

THE COURT: What do you think, Mr. Selwyn?

MR. SELWYN: We agree that it should be one case, not two. I think we can talk about it offline. It's just the first I've heard at this point, but we can dress it out.

THE COURT: Why don't you see if you can work it out and let me know, and see if you can get a stipulation, whatever you want to do, on file within a week, just so I can keep my docket in some order.

As far as the pretrial schedule in the first wave or first bucket of cases, as I understand it, the parties have agreed in Exhibit A to their statement to a schedule. Is that right? Are you all on the same page, here, or is this just a proposal from the defendants?

UNIDENTIFIED SPEAKER: I believe the defendants made a proposal and Adaptix indicated it was generally in agreement, but they didn't offer any different proposal.

THE COURT: Okay. Is that correct?

UNIDENTIFIED SPEAKER: Yes, your Honor.

THE COURT: Okay, then I'm going to adopt the two schedules that are proposed. As I understand it, the one is to the case -- the Apple-Verizon case that will be tried in February, and the other applies to the remaining cases.

The one outstanding issue that I have marked in my notes is when we're going to have a hearing on the dispositive and *Daubert* motions in the Apple-Verizon case. The proposal sets out a November 4th date for that hearing.

Mr. Rivera, since you have control of the calendar, as always, can you just confirm, am I available for a hearing on that date, on the 4th?

THE CLERK: Yes, your Honor. Tuesday, November 4th at 10:00 a.m. is available.

THE COURT: Okay. Since I have a number of other matters scheduled on the 4th, I'd like to set this specially in the afternoon, so that I can give you the time that's required to get it right.

Mr. Williams, you're standing.

MR. WILLIAMS: Sorry, your Honor.

THE COURT: Go ahead.

MR. WILLIAMS: You said that would be in the Apple-Verizon case, or would that be in all the first wave cases?

THE COURT: I'm sorry, that would be in all of the first wave cases. I think I conflated those two. So let's go

ahead and set this for -- I will adopt the two schedules that are laid out in the proposal in the statement, and we'll confirm November 4th at 1:00 o'clock as the start time for that hearing, and I understand there are perhaps a number of motions to be filed.

The only other scheduling issue, I just want to confirm with everybody here, is, what are we going to do about the second trial? I suppose we can put out of mind for a moment the third trial and assume something's going to happen in the first or the second that might affect it, but you all have proposed a May 4th, 2015 date for the second trial, correct? Is that right? Okay.

Mr. Rivera, can you just confirm, am I available for trial that day?

THE CLERK: Your Honor, you presently have another trial scheduled for that date.

THE COURT: Just remind me what case that is, Mr. Rivera.

THE CLERK: BMO Harris Bank versus Bono (phonetic).

THE COURT: Well, as I look at my calendar -- no, I'm not going to play calendar guessing-games with you all here. Why don't I take a look at my own schedule. I'm going to do my best to get you a trial date as close to the 4th for that second trial as I can, and I'll get that posted in a matter of a day, tops, because we need to get everybody,

obviously, prepared. But it will be around the 4th, give or take a few weeks. It's just, my trial schedule's pretty jammed already for 2015.

Okay, unless there's anything else on wave one -- Mr. Selwyn, anything else on wave one?

MR. SELWYN: Nothing, your Honor.

THE COURT: Why don't we turn to wave two, and for wave two, I am referring to the Dell, Blackberry, Amazon, Sony, and ASUSTeK cases. If I could, let me just march through my issues and I'll invite you all to raise any other issues that you have.

The first question I have is whether or not each of the named defendants has been served. There seemed to be some open question about that in the statement. Are there any outstanding defendants that you all -- I'm looking at the plaintiffs, of course -- have not yet served but anticipate serving, or is everybody served, as far as you know?

MR. HAYES: I don't know, but the person that would know is Mr. Ercolini, who's on the phone, would know much more about that than I.

THE COURT: All right, I'll invite input from anybody on the phone.

MR. HAYES: Mike, do you know the answer to that question?

MR. ERCOLINI: Sorry, whether or not all defendants

have been served with infringement contentions?

MR. HAYES: No, no, no, served --

THE COURT: Service of process.

MR. ERCOLINI: Right.

THE COURT: What I'm asking you about is, on page --

MR. ERCOLINI: I'm sorry.

THE COURT: I'm sorry, let me just give you some context for my question. In section one of the statement pertaining to this wave two set of cases, there's a reference on page 3 to service, and there's a reference to a footnote 4 -- I'm not sure where that footnote is -- that suggests that less than all of the defendants have been served.

Is it correct that all the defendants have been served or is there one or more defendant in this wave that is still outstanding?

MR. ERCOLINI: Our understanding, your Honor, is that all defendants have been served. I'm not sure which defendant that footnote refers to. The only one I think that may be the issue would be ASUSTeK, but I believe that complaint has been served, as well.

THE COURT: Okay, Mr. Lemieux?

MR. LEMIEUX: Service has been perfected, your Honor.

THE COURT: Okay, thank you for confirming that. I'm sorry to make that so complicated.

All right. Well, with service taken care of -- bear with me for a moment -- all right. The next question I had in this wave was, in the statement, the parties have suggested there's a brewing dispute or potential dispute around leave for Adaptix to amend, I believe, its infringement contentions, perhaps to either name new products or to add new theories.

Let me just ask, is there a dispute about that, and if so, what's the dispute? I'm just looking to head off another round of motions, if I could.

MR. GANNON: Yes, your Honor, Adaptix would like to seek leave to amend its infringement contentions, similar to what we tried to do in the first round of cases. We feel it's appropriate here, because it's so early, there's been no discovery, nothing's really happened. To the extent that the defendants need more time to re-serve their invalidity contentions --

THE COURT: You'd have no problem with that?

MR. GANNON: -- no problem with that, or if any other deadlines need to get pushed off, we're fine with that, as well.

THE COURT: Can I just ask, in this second wave of cases, at least some of the cases were originally filed in the Eastern District, correct?

MR. GANNON: Exactly.

THE COURT: Okay, and as I understand the procedural

history, if I've got this right, in those cases, there were what they call down there preliminary infringement contentions served?

MR. GANNON: Yes, your Honor.

THE COURT: Okay, so you're looking to amend those contentions. Roughly speaking, Mr. Gannon, when were those preliminary contentions served? I'm not going to hold you to it, but are we talking about a few months ago, a year ago?

MR. GANNON: I want to say February of this year, your Honor.

THE COURT: Okay, so several months ago.

MR. GANNON: Several months ago.

THE COURT: If you're wrong about the precise date, I'm sure they'll correct --

MR. GANNON: February-March.

THE COURT: Okay. All right, well, let me ask one or more of the defendants to address this issue. Again, I don't have a motion before me yet, but I just wanted to get a sense of what the dispute is.

MR. CRUZEN: Your Honor, I drew the short stick, so I'll speak on behalf of Amazon --

THE COURT: Go ahead.

MR. CRUZEN: -- and also on behalf of the other defendants in the bucket two cases, and our position is that Adaptix has not been diligent in seeking to amend. Counsel's

correct that preliminary infringement contentions were served in February. We're now seven months down the road. They sought to add this theory in the earlier wave of cases. The Court denied that attempt, because they hadn't been diligent. That was a couple months ago, and they still haven't filed their motion to amend their infringement contentions.

We don't think you even need to reach the issues of prejudice, but several things have happened since they served their preliminary infringement contentions. We served invalidity contentions based on the way they framed their theories. We proposed preliminary claim construction terms and we actually proposed preliminary claim constructions, all based on their original theory.

Furthermore, their deadline to serve inter partes review petitions has passed. Parties made strategic decisions about whether to seek that or not. In fact, two parties have filed IPR petitions based on the way they had couched their theories originally.

So we think, both for reasons of their failure to be diligent in seeking to amend and the prejudice that we would suffer, the Court should deny a motion, if it isn't filed, and we will oppose it if it is filed.

THE COURT: All right. Well, at the very -- again, thank you. At the very least, it sounds like there's a dispute here, and so to the extent Adaptix wishes to amend, I suppose

it has to bring a motion to do that, so I'll look for that. I just thought I'd touch the issue while you were all here.

And I also took from counsel's comments that my work in claim construction is not yet done. Sure, why not? (Laughter).

Okay, all right. Could I also just ask another management question? In the statement in the wave two cases, or bucket two cases -- we'll call them wave two cases, and leave it at that -- there was a reference to the parties hashing out an ESI order of some kind. Have you made any further progress on that, or when would you expect that to be filed? I just wanted to make sure that that wasn't ignored.

I'm seeing a lot of blank faces, so I'm guessing you haven't yet had a chance to have a meaningful conversation. Is that fair? I'm not criticizing --

UNIDENTIFIED SPEAKER: I don't believe so.

THE COURT: -- you know, I'm just trying to figure out what's going on.

UNIDENTIFIED SPEAKER: Your Honor, I believe the parties have exchanged drafts.

THE COURT: Okay.

UNIDENTIFIED SPEAKER: They just haven't finalized the draft.

THE COURT: Well, I'm not going to set a hard deadline for it. I would just ask that -- well, no, I am going

to set a hard deadline for it. Why don't we say that no later than four weeks from today, the parties should submit either a joint proposed ESI order or competing proposals. I just don't want to see that lag, and things tend to fall by the wayside as we get busy with other things. So if we could set that for four weeks from today, I'd appreciate it.

The next item of business has to do with the discovery. It seems that when we're talking about depositions, RFAs and all that, the parties have some -- and expert depositions, some pretty different views about scope and volume.

Mr. Gannon, I'm turning to you first, I suppose --

MR. GANNON: Yes, your Honor.

THE COURT: -- because you're closest to me. What do you have in mind? It seems like everybody agrees that some number of hours is going to be required, but you can't figure out how to reach common ground on exactly what you need. So why don't you tell me what you think.

MR. GANNON: Basically, with respect to Adaptix witnesses, they've already been deposed a few times across the first wave of cases in the Texas cases, and the parties have agreed that that deposition testimony can be reused in these cases.

THE COURT: And when you say the Texas cases, I just want to be as precise as I can, because there's all sorts of

cases floating around. You're now referring in this context to the base station cases, which remain in Texas?

MR. GANNON: And there is one, the LG.

THE COURT: And the one LG handset case.

MR. GANNON: And there's a Pantech, but we don't -- there's three cases that are -- three handset cases that are currently pending in Texas.

THE COURT: All right. In any event, what you're telling me is, one thing you've been able to agree on is, all the depositions of your people in any of these cases is fair game in these cases.

MR. GANNON: Exactly.

THE COURT: Okay.

MR. GANNON: And just to be more up front, there are some -- a second wave of Texas handset cases, as well, Huawei, ZTE, NEC Casio, we have a number of others. So --

THE COURT: Am I going to guess that they're going to be moving to transfer some or all of those cases up here?

MR. GANNON: No, I think the transfers are over, your Honor.

THE COURT: Okay, all right. I thought I'd ask.

MR. HAYES: They feel lucky, take it.

(Laughter.)

THE COURT: Okay. In any event, you were saying that -- I take it your view is, look, we've all agreed, all of

these transcripts in all of these other cases are fair game in this case; do we really need to do more here?

MR. GANNON: Exactly, and I believe that the May 16th -- the previous CMC that was held, the defendants made the argument that these are new products and everything else. That's all well and good, but the Adaptix witnesses are testifying about Adaptix and they've already given the testimony.

So absent -- I believe your Honor made the statement that absent a showing of good cause for additional deposition time with the witnesses that were previously deposed in the first round of cases, then they won't be fair game.

THE COURT: By the way, since you brought up the May CMC, I take it I still haven't issued that scheduling order, have I?

MR. GANNON: Exactly, you have not.

THE COURT: So I need to get that out. Okay, I will -- I apologize for that, but for the record, it has been sufficient to move the cases along up until this point.

MR. GANNON: Actually, on that point, your Honor --

THE COURT: Yes.

MR. GANNON: -- I believe the reason why the order was never issued was, there was the intention of the Court to align the second and third wave of cases, and that's why everything has been effectively stayed since the CMC that was

held on May 16th.

THE COURT: Okay. Well, I suppose we'll get to the actual schedule in a moment, but in terms of your proposal, what you're saying, then, is when it comes to the defendants, you're proposing to take about 150 hours of deposition, with no more than 50 of any one defendant?

MR. GANNON: Yeah, for all defendants, and there's numerous defendants. I mean, we won't even come close to hitting that mark.

THE COURT: Okay, and then you're offering to give up 75 hours of depositions of your people.

MR. GANNON: To the extent they need additional testimony.

THE COURT: Okay, and can I ask you, Mr. Gannon, just to refresh my memory, in the wave one cases, what limits did the Court ultimately settle on? I should know this, but --

MR. GANNON: I believe it was the four, 150.

THE COURT: 150 --

MR. GANNON: I don't recall, that, unfortunately --

THE COURT: Okay. Can I just ask, as a matter of fairness in concept and consistency, whatever it is I did in the wave one cases, is there any reason why I shouldn't just do the same thing here?

MR. GANNON: Because these witnesses have already been deposed.

THE COURT: Okay, so you would suggest that, at least as to any parties that are overlapping, and that's of course primarily Adaptix --

MR. GANNON: If there's any additional -- any additional witnesses that pop up they feel they need testimony from, we're open to meet and confer with -- conferring with defendants and allowing them to take whatever they need.

THE COURT: One last question for you, Mr. Gannon, before I turn to defendants on this issue of discovery limits.

I'm curious. So if my memory is correct and consistent with what you just told me, I ordered 150 hours a side, I think, or something like that, in the '481 case? Did you all end up using all 150 hours a side?

MR. GANNON: We're not even close, I don't think.

THE COURT: Okay.

MR. GANNON: I could be wrong.

THE COURT: Okay. I appreciate that. Well, he'll correct me if you're wrong about that, but I appreciate the representation.

MR. GANNON: And one final issue?

THE COURT: Yes.

MR. GANNON: With respect to the Adaptix witnesses, the inventor, Dr. Liu, who's already been deposed I believe for three or four days already -- and again, he's similarly situated to a regular Adaptix employee -- to the extent --

we're okay with allowing these defendants to take another five hours at most of him, but it's -- at this point, it's borderline harassment.

THE COURT: Can I ask, Mr. Gannon, just so I have it straight, Dr. Liu, is he currently an Adaptix employee?

MR. GANNON: He's not.

THE COURT: Okay. So you're just pointing out, though, that his status is similar, if not identical.

MR. GANNON: He's been taken numerous times, and --

THE COURT: He's been taken to the woodshed enough, okay.

MR. GANNON: Yeah.

THE COURT: Okay. All right. Who wants to speak on this one?

MR. CRUZEN: I will speak, your Honor.

THE COURT: Okay, go ahead. Go ahead.

MR. CRUZEN: If I could just address that last issue --

THE COURT: Sure.

MR. CRUZEN: -- first, with regard to Dr. Liu, at the last case management conference, Adaptix made a proposal that the defendants collectively be limited to 12 hours per inventor, and there were four inventors. We agreed to that, if we could use the prior inventor testimony in our case for any purpose, and the Court found that acceptable, asked Mr.

Ercolini, who was on the phone, if he agreed to that, and he agreed to it. I have a copy of the transcript, if you'd like to see it.

So we think that issue has been resolved, and we're not aware of anything that's changed for Dr. Liu or why he should be treated differently.

THE COURT: So again, I apologize, I've been in trial all day --

MR. CRUZEN: Yeah.

THE COURT: -- but maybe I'm just mis-remembering what happened at in earlier May conference. You're reminding me that I already addressed the issue of Dr. Liu. Did I already address the issue of deposition hours limits, as well?

MR. CRUZEN: I don't believe so, and I don't think that that particular issue was at issue.

THE COURT: Okay, that piece was left.

MR. CRUZEN: There was a lengthy discussion about whether the carriers' witnesses, who were deposed in a prior case, could be deposed again. I think you concluded, not without good cause.

So it makes sense that you have some recollection of discussing depositions. So unless you have questions about that inventor issue, I'll move on to --

THE COURT: No, why don't you turn to the other

issue.

MR. CRUZEN: Okay. Well, our position is basically that there should be symmetry between the two parties. Just as some Adaptix witnesses have been deposed previously, the carriers' witnesses have been deposed, as well. To the extent that defendants need fewer hours, so does Adaptix. I represent Amazon. We weren't a party to any of the prior cases. I didn't represent any other parties in the other cases. I had no opportunity to ask Adaptix witnesses any questions.

Their proposal's 75 hours for the manufacturers. Ours is 150, which is exactly what they proposed for themselves. That would give me roughly -- and I think there are 10 defendants now in these cases -- 15 hours *pro rata*. We don't think that's abusive. We think the 150 limit is sufficient to make sure there's no mischief that goes on, and will be efficient.

I mean, to the extent testimony which has already been elicited that gets us where we need to be, we're not going to repeat that testimony just to harass Adaptix witnesses. But we think there should be symmetry between the parties.

If anything, we need more time because we're coordinating among many different sets of lawyers.

THE COURT: Can I ask you, based on your take on what's happened in the wave one cases thus far, I mean, how many additional -- how many Adaptix employees do you think are

really going to be in play here?

MR. CRUZEN: They have identified 11 witnesses in their initial disclosures. I think previously Mr. Ercolini thought that 10 to 12 witnesses would be at issue in the case. I'm relatively new to the case, although I've now graduated to wave two, apparently. So that's the best knowledge I have on that question.

THE COURT: Okay. Okay, does anybody else want to be heard on the issue of deposition hours?

Mr. Gannon, go ahead, sir.

MR. GANNON: I just want to address -- my brother had made the statement about Dr. Liu and how we had originally agreed to the 12 hours at the May 16th CMC. That may have been true; however, the circumstances have changed. Dr. Liu has sat for two additional days for deposition in the Texas cases. So he's now sat for at least three days of deposition.

THE COURT: Is he set -- let me ask you, Mr. Gannon, is Dr. Liu set for any further deposition in Texas, as far as you know?

MR. GANNON: I believe the Huawei and ZTE defendants are looking to take another deposition of him.

THE COURT: So he may face even more --

MR. GANNON: Additional, exactly.

THE COURT: And I take it there's no question that those transcripts, to the extent further deposition is taken,

will be fair game as well?

MR. GANNON: We have no objection to that, your Honor.

THE COURT: Okay.

MR. GANNON: The final point with him, he's no longer in this country. He's in Shanghai, China. So it's -- it would be an inconvenience for him to --

THE COURT: Has he been traveling here to the U.S. for his depositions?

MR. GANNON: Yes and no. Originally, no, he was at the University of Washington, but for his second round of depositions, he had to fly from Shanghai.

THE COURT: Okay. All right, thank you.

MR. KUBEHL: Your Honor?

THE COURT: Yes, go ahead.

MR. KUBEHL: Just briefly, for T-Mobile?

THE COURT: Go ahead, Mr. Kubehl, yeah.

MR. KUBEHL: T-Mobile was a defendant in the base station side of the cases, but this and the round two Texas cases are the first time that T-Mobile has been a handset patent defendant.

The proposal by the plaintiff is that T-Mobile be barred across the board from taking any depositions, both of Adaptix and the inventors. They have not had a chance to take a deposition on these patents, so we'd ask that that be

considered.

There's also a suggestion by plaintiff that in any other cases that a carrier defendant is a party, that Adaptix could use for all purposes any transcripts of depositions from those cases, and T-Mobile's participating in the base station side of the cases involves information that's subject to a protective order in that case, and we would ask that the Court not grant that relief and swing open the doors of the protective order in the base station case into this case.

THE COURT: Could you just elaborate on that last point, Mr. Kubehl, make sure I understand what's going on?

MR. KUBEHL: Sure. So T-Mobile produced information and gave deposition testimony relevant to third party information that's relevant in the base station cases, subject to protective order in those cases. That protective order is not the same protective order as this case. And so we'd ask that the Court deny the request that any testimony given in any proceeding that T-Mobile has been a part of is --

THE COURT: Ah, so you're saying it's not so much T-Mobile's confidential information that's the issue, it's third party CI that was produced in the Texas cases.

MR. KUBEHL: That would be an issue.

THE COURT: Okay, I think I understand it.

All right, anything else on depositions?

MR. McGRORY: Yes, your Honor. Sprint is situated

similar to T-Mobile, in that it has been in the base station cases in Texas, it is in later filed Amtech (phonetic) cases, but it hasn't participated in any deposition of any inventor with respect to the patents that are at issue in this case.

THE COURT: Okay.

MR. HAYES: Judge, can I have a --

THE COURT: Yes, go ahead, Mr. Hayes.

MR. HAYES: Thank you, Judge. With respect to the use of depositions -- and also this would include something that will come down the road in front of you vis-a-vis documents, because I know you've ruled about the protective order and the use of some of these documents in Sprint -- we intend to file a motion to compel these carriers to produce these documents that they say we used in violation of the protective order, simply because they were obligated to produce those documents in the case in Texas before it got transferred here, and they're obligated to produce them here, because it went to the document request.

And the reason, so that you've got a handle on this, is one of the key -- one issue is whether this FSS system, Frequency Selective System, is or is not a big deal, and we think it is, and we think it's worth a lot of bucks, and we think it's a big deal.

The documents that they marked confidential, and don't want anybody to be using, say it's the brains of the

system. Well, that obviously is a relevant document that should have been produced here, and as we all know, in Texas, they don't do document requests. We should have had it. So you can't take the key admission that "I did it," put a different Bates number on it, and off we go.

Same thing with these depositions, is that somehow we're going to have to figure out that if, you know, AT&T in a base station case testifies, yes, this the brains and the heart of the system, he can't run up the stairs, hop on that stand and say exactly the opposite, and then I have a deposition to impeach the person, and they jump up and say, Hayes, you can't use that, that's for violating a protective order, and none of the truth is getting to the jury.

So I'm just letting you know that this is a sticky wicket.

THE COURT: And I take it a motion will be coming --

MR. HAYES: We're going to file -- I've tried to figure out how to resolve it, because -- and I think the simplest way to resolve it is a simple motion to compel that says, A, you should have produced it in Texas, you certainly should have produced it here, and so just produce it, put a different Bates number, and then all that stuff that -- then no one's in violation of anything. So I'm just telling you, that's probably coming down the road quicker than the train.

THE COURT: All right. Thank you, Mr. Hayes.

I look forward to it, and I actually mean that.

Let me also just ask, I have your respective positions on RFAs, expert depositions and the like. Is there anything anybody needs to add to the papers on those issues?

If not, what my thought is, on discovery limits, let me go back and compare your proposals, look at that transcript from the May conference. I want to get this right. And so rather than hash out some limits on the fly here on the bench, I'll get it figured out and I'll include it in my order so that you have that in hand, and I'll try to get that out as quickly as possible.

One other just housekeeping matter in wave two before I just turn to wave three, which is, in the -- I believe in the statement for wave two, the parties had agreed that something like four hours would be required for claim construction. I'm always heartened at that notion. Do you really think four hours is going to be enough? Can you tell me at this point, I mean, without binding anybody or anything, are we talking about a couple more terms or a whole new list of them?

What is your sense at this point?

MR. GANNON: Your Honor, it's Adaptix's position that all the claim terms at issue have already been construed. We face additional constructions in the second wave of Texas cases, and they've already been construed, again, by Magistrate

Judge Craven.

We think every term that needs to be construed has already been construed. It's just that it's a further attempt by the defense to gin up further noninfringement arguments.

THE COURT: All right. Well, who wants to respond to that, Mr. Cruzen?

MR. CRUZEN: Your Honor, I think four hours may be realistic. We do have a number of terms that we proposed in construction that are different from ones considered by the Court previously, that I'm equally optimistic that four hours would provide.

THE COURT: Okay, well, I thought I'd just ask, and obviously, you'll have a chance to present your respective arguments. In the schedule that the parties have jointly proposed at Exhibit A in this wave, I think you have proposed a claim construction hearing on or about May 14th, correct?

Mr. Rivera, can you just tell me, does our calendar allow that date?

THE CLERK: Yes, your Honor. Thursday, May 14th is available.

THE COURT: Yes, so we're going to specially set that, and because I normally don't hear matters -- civil matters on Thursdays, but in this case, why don't we go ahead and set that for a special hearing.

To encourage us all to hold to that four hours that

have been suggested, why don't we start at 1:00 o'clock, and see if we can get done before the end of the day.

The other date in here, I just wanted -- there are two other dates, actually, I wanted to just speak to this afternoon. For the hearing on the dispositive motions, you're proposing March 31 of 2016. That's hard to imagine where you've been thinking about that, but Mr. Rivera, I assume I'm available on the 31st for a hearing?

THE CLERK: Your Honor, that date's also a Thursday.

THE COURT: Oh, it is a Thursday also, huh?

THE CLERK: Yes, your Honor.

THE COURT: Well, I'm happy to set it for Thursday, just because I suspect we're going to have multiple motions.

THE CLERK: That day is available, your Honor.

THE COURT: Okay, so I'll include that in the scheduling order. The final date, Mr. Rivera -- there are two other dates, just to confirm -- July 25th, 2016, is the Court available for a pretrial conference on that date?

THE CLERK: That's a Monday, July 25th, your Honor. Tuesday, July 26 at 10:00 a.m. is also available.

THE COURT: Okay. Let's keep it on Monday, the 25th, Mr. Rivera, again assuming we're going to have many issues to resolve.

Finally, August 1st, 2016, is the Court available on that date for a trial?

THE CLERK: Yes, your Honor. Monday, August 1st is available.

THE COURT: Fantastic. I will now include those dates as you have proposed them.

I think that gets through the issues raised in the wave two statement, which brings me to wave three. Mr. Gannon, did I miss something?

MR. GANNON: Yes, your Honor.

THE COURT: Go ahead.

MR. GANNON: The proposed limits on expert depositions?

THE COURT: I thought I'd suggested that perhaps your statements were enough for me, but if you have something you want to add --

MR. GANNON: No, no, that's fine.

THE COURT: Okay, if you're good with what you wrote, I'm happy.

MS. GOLINVEAUX: Your Honor, if I may, on behalf of Dell --

THE COURT: Of course.

MS. GOLINVEAUX: -- there's one point we wanted to raise, and it's the last bullet point raised on page 9 under the plaintiff's statement regarding depositions.

THE COURT: Go ahead.

MS. GOLINVEAUX: And here, it's been suggested

Adaptix be able to use for all purposes transcripts of depositions taken of carrier defendants in any other case brought by Adaptix, and Dell just wants to raise the point that for depositions, we didn't have the opportunity to attend. Without knowing how plaintiff intends to use those depositions, we don't think it's reasonable to have unilaterally free (inaudible).

THE COURT: Okay, so you're opposed to even permitting those transcripts together with giving you the opportunity for further depositions?

MS. GOLINVEAUX: Not necessarily, your Honor, but we wouldn't want to have a blank slate for them to use deposition transcripts without our opportunity to have -- for the earlier depositions that we weren't able to attend.

THE COURT: Okay, so if I understand what you're saying, then, what you're saying is, let's assume we're talking about, I don't know, AT&T, just to pick on someone. Because Dell wasn't at that deposition, you're saying you should get to ask questions of AT&T. If you get that opportunity, you're not opposed to permitting the use of the earlier transcript, but you just want to make sure, if that transcript's coming in, you get a shot to ask your own questions.

MS. GOLINVEAUX: That's correct, your Honor.

THE COURT: I got it. Okay, thank you. All right, well, I'll address all these issues in my order.

Wave three, I assume there is substantial overlap in the set of issues for wave three as with wave two, and so I won't ask you to belabor a lot of these points, but -- well, let me just start with -- let me just start with the schedule, if I could.

Again, here I understand that the parties have proposed a schedule that coincides nicely with the schedule for wave two, is that right? All right. Done. I'll take that as a yes, and I appreciate everyone's brevity.

And I also understand that there is a set of competing proposals for deposition limits, experts and all that, that is identical to the -- or is it perhaps different?

MR. EISEMAN: Your Honor, David Eiseman on behalf of Kyocera. It's slightly different --

THE COURT: Go ahead, Mr. Eiseman. Tell me what's going on.

MR. EISEMAN: -- in that, your Honor, in our case, the wave three cases, there have not been infringement contentions served yet.

THE COURT: Right.

MR. EISEMAN: And plaintiff has indicated that they intend to, in fact, raise the Mode 3 allegations as a new infringement theory. And so we're not in the same situation where we have a set of the exact same infringement contentions as in the prior cases.

So from defendants' perspective, we've proposed a hundred hours of depositions. Plaintiffs have said 63 hours. We think a hundred hours is less than the 150 your Honor ordered in wave one, and so we think it's a reasonable number, and we'd ask that you adopt that.

THE COURT: Okay. Are there any other significant differences I ought to be aware of, Mr. Eiseman?

MR. EISEMAN: I think, other than that, I think we're pretty much in line with wave two.

THE COURT: Okay, all right. And am I right in understanding, then, that because you are proposing the same date for a *Markman* hearing and for a dispositive motion hearing, that you propose to coordinate with the defendants in wave two for each of those hearings?

MR. EISEMAN: We do, your Honor.

THE COURT: Okay, fantastic. I like the sound of that.

MR. REEDER: Your Honor, Mike Reeder for HTC. The other difference, and going off that same point in wave three, because there's no infringement contentions that have been served, Adaptix has proposed a collective maximum of hours for expert reports -- excuse me -- for expert depositions at 10 hours. Without having seen the infringement reports (inaudible) reasons to limit that, and we can just go with the normal proposal of seven hours.

THE COURT: Okay, I appreciate that, Mr. Reeder.

May I just ask, Mr. Gannon, are the hours and other limits that you're proposing in wave three independent of -- I assume they are independent of the limits that you're providing in wave two.

In other words, you're providing a certain number of hours in wave two, that's for those defendants. You're proposing another set of hours for wave three, that's for the wave three defendants. Is that fair?

MR. GANNON: Our preference would be that the cases would be all be aligned, and the one limit would be for all defendants. I mean, it makes sense, I mean --

THE COURT: The hours limits.

MR. GANNON: -- the hours limits, and my brother that represents HTC made the point that HTC needs all these hours. HTC is a defendant in the first round of cases. Yes, there's additional products at issue in the third round of cases; however, it's the same accused functionality in these new products that are at issue in the third round of cases.

THE COURT: Okay.

MR. GANNON: So it's...

THE COURT: I think I have your position, then. All right, well, I certainly have your statements to work through some of these details.

As to wave three, or frankly, at this point any

other wave, are there other issues I've missed That we ought to talk about this afternoon, or this evening? Wow...

MR. ERCOLINI: Your Honor, this is Michael Ercolini for plaintiff Adaptix.

THE COURT: Go ahead, Mr. Ercolini, yeah.

MR. ERCOLINI: Judge, one other thing to bring to the Court's attention. I think Sprint had made the statement that Adaptix should be precluded from using deposition transcripts completely as Adaptix litigation, on the basis of the patents-in-suit being different. However, in their proposal, it's worth noting that Sprint is seeking to preclude Adaptix taking any further depositions of Sprint employees or customers during the third bucket of cases.

So I would submit to the Court that that would be inconsistent with their -- with their prior statements regarding the use of deposition transcripts.

THE COURT: Okay, Sprint want to respond?

MR. McGRORY: Well, your Honor, to the extent that topics for the 30(b)(6) notices are different, obviously we'll work with counsel for Adaptix, but we don't need to have the same deposition taken of the same witness, even though they're different patents.

THE COURT: I understand, okay. All right --

MR. ERCOLINI: Your Honor?

THE COURT: Yes, go ahead, Mr. Ercolini.

MR. ERCOLINI: One final issue. It's also worth noting that for the previous carriers that were in the first wave of cases, Verizon and AT&T, we took depositions across all of the cases at once. We think that those transcripts should be usable in this second and third wave of cases, and again, as Mr. Hayes said previously, we think because the patents-in-suit are related and have a technological nexus with the current patents-in-suit, we think that those transcripts should be usable, as well.

THE COURT: One last question for you, Mr. Ercolini. Since I'm trying to get my head back around the issues in each of these cases, if I remember, at an earlier hearing, perhaps at our very first one, you explained to me that in these cases I'm dealing with the '212 and '748 patents, correct?

MR. ERCOLINI: That's correct, your Honor.

THE COURT: And the cases that are in Texas involve those patents, but also involve other patents in the same family, is that right?

MR. ERCOLINI: That's correct, your Honor.

THE COURT: Okay, I think I've got it. Well, I'm going to quit while I'm ahead. Are there any other issues I can help you with? Have a good evening. Thank you.

Thank you, operator.

TELEPHONE OPERATOR: You're welcome.

6:06 p.m.

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CERTIFICATE OF TRANSCRIBER

I, Leo Mankiewicz, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

09/26/2014

Signature of Transcriber Date